

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Mustapha Maisonneuve, :
Petitioner, :
: :
v. : File No. 96-CR-17-2
: :
United States of America, :
Respondent. :
:

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION
(Paper 169)

Petitioner Mustapha Maisonneuve has filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, claiming that his sentence violated his constitutional rights under Blakely v. Washington, United States v. Booker, and United States v. Shepard. (Paper 169). For the reasons set forth below, I recommend that the Court deem the motion second and successive, and TRANSFER it to the Second Circuit pursuant to 28 U.S.C. § 1631.

Discussion

On September 30, 2002, Maisonneuve filed a motion pursuant to 28 U.S.C. § 2255 in which he challenged his March 7, 2000 conviction and sentence on the basis of ineffective assistance of counsel. (Paper 156). The Court denied Maisonneuve's motion (Papers 163 and 166), and the Second Circuit subsequently dismissed his appeal of that decision with prejudice (Paper 168). Maisonneuve now

presents the Court with a second § 2255 motion to correct the same sentence he challenged in his prior motion. (Paper 169).

The Second Circuit has instructed that when a district court receives a second or successive § 2255 motion, it should transfer the motion to the Court of Appeals pursuant to 28 U.S.C. § 1631. See Liriano v. United States, 95 F.3d 119, 122-23 (2d Cir. 1996). The Second Circuit will certify the motion if it contains "newly discovered evidence" or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255. If certified, the motion may then be heard by this Court.

Conclusion

For the reasons set forth above, I recommend that the Court construe Maisonneuve's motion (Paper 169) as second and successive, and TRANSFER the case to the Second Circuit pursuant to 28 U.S.C. § 1631.

Dated at Burlington, in the District of Vermont, this 14th day of July, 2005.

/s/ Jerome J. Niedermeier
Jerome J. Niedermeier
United States Magistrate Judge

Any party may object to this Report and Recommendation within 10 days after service by filing with the clerk of the court and serving on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. Failure to file objections within the specified time waives the right to appeal the District Court's order. See Local Rules 72.1, 72.3 & 73.1; 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b), 6(a) and 6(e).